SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI,

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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1. Consideration of Matters Dehors the Record

The basic fallacy of respondent's argument is the assumption that because press releases were issued subsequent to the decision of the Board of Immigration Appeals, considerations outside the record did not motivate the Board (Brief p. 36). It should first be observed that the Hearing Officer's decision of May 15, 1952 (Immigration File p.

160) was only a recommendation. The Assistant Commissioner's decision of July 7, 1952 was likewise tentative since the case was certified to the Board for final action. Thus the Board's decision was the only one which could be dispositive herein. The petition for a writ alleges that on October 2, 1952—prior to the Board's decision—a secret purge list containing petitioner's name was circulated to the Board and that because of this listing petitioner could not secure fair consideration or reconsideration of his case (R. 3-4, par. 13-18). Nowhere is any claim made that the Board was unaware of this racketeer listing before the administrative decision herein. If known to the Board, as contended, its influence on a decision is obvious.

It is evident that since the preparation of this list on October 2, 1952, petitioner has been considered a racketeer by the Department of Justice. No opportunity has been afforded him, however, to show that such accusation is false. Significantly, when petitioner sought a stay in this Court before Mr. Justice Jackson and when he sought and secured release upon bail by the full Court, the respondent did not come forward to oppose such applications upon the ground that petitioner was a nationally known hoodlum or racketeer. If proof to that effect was available, as an officer of the Court, the Attorney General should have been duty-bound to disclose it. In any event, whether considerations dehors the record motivated the Board is a question of fact which should not be resolved by an appellate court but should be left to a hearing on the writ. Such hearing will not improperly require a probe of the mental process of executive officers. In *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937) and *United States* v. *Abilene & S. R. R. Co.*, 205 U. S. 274 (1924) this Court had no hesitancy in declaring hearings unfair where matters outside the record were considered. In fact, the *Second Morgan* case [*Morgan* v. *United States*, 304 U. S. 1

(1938)] does not forbid such declaration. There this Court said at pages 18-19:

> "* * * we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusion, *if he gave the hearing which the law required* * * *. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." (Italics supplied.)

2. The Board's Opinion

The Government now seeks to show that suspension of deportation was denied petitioner by the Board for three reasons: (1) A suspended sentence conviction for conduct in 1934—twenty years ago, (2) Inability to fully explain his income and (3) Claim of father as a dependent (Brief p. 29). A reading of the Board's opinion, set forth in the appendix to petitioner's main brief does not confirm this. The opinion contains in detail petitioner's assets and income without any comment. It notes that petitioner claimed his 78 year old ill father as a dependent after 1946. The administrative record discloses that in 1943 and 1944 the father conveyed his assets to a daughter-in-law for investment in real estate. (Immigration File pp. 43-45). Thereafter petitioner secured income from collecting rents from this real estate investment and supported his father (Board's Opinion)—an arrangement which is understandable. No evidence whatsoever was adduced to show that Internal Revenue disapproved the claim of dependency. The 20 year old crime for which he was given a suspended sentence conviction alone mars petitioner's record. The cases are legion where old offenses even of a more serious character have been held no bar to discretionary relief.

Matter of Henderson, File 56208/353 (Conspiracy to defraud); *Matter of DaSilva*, File A6054739 (Perjury and Forgery); *Matter of Gagne*, File 3934172 (Impairing morals of a minor); *Matter of Javellana*, File A1403830 (Manslaughter); *Matter of Hansen*, File 1452036 (Theft). *Matter of Marlinson*, 56171/297 (Armed robbery). The reason discretion was refused herein was not disclosed in the Board's opinion but in later Press Releases. It was the unfounded and unsupported belief of the Board that petitioner was a nationally known hoodlum and racketeer.

3. Right to a Fair Hearing

The Court below assumed that in view of the regulations, procedural due process required a hearing upon the record evidence in a case where suspension is sought (R. 22). It cited *Alexiou* v. *McGrath*, 101 F. Supp. 421 (Dist. of Col., 1951) with approval as had the Third Circuit in *Arakas* v. *Zimmerman*, 200 F. 2d 322 (C. A. 3, 1952).

Although the Government has not cross-appealed or sought certiorari to attack this conclusion, it now seeks to do so. It did not attack this ruling in the courts below and may not raise the issue for the first time in this Court. So too, with regard to the statement of petitioner's counsel that confidential information might be utilized. Such statement was made on October 8, 1951 prior to the recommended decision of the Hearing Officer of May 15, 1952. It was made without knowledge that any off the record matter had been utilized as it was coupled with the statement that "no evidence presented including certain reports of officers of the Immigration and Naturalization over the course of three years, relative to outside investigations, has been detrimental to the respondent" (Immigration File p. 163). This last sentence is omitted from the government's quotation at page 25. It reveals no waiver. A waiver requires knowl-

edge of the facts [*Albert* v. *Martin Customs Made Tires*, 116 F. 2d 962 (C. A. 2, 1941)]. Here there was no knowledge in 1951—prior to the Board's decision—that adverse confidential information was available or that it had been utilized. On the contrary, respondent disclaims its use but asserts an advance waiver—if such a waiver without knowledge be possible.

The regulations quoted at page 41 of the Government's brief (8 C. F. R. 150. 7-150. 13) have nothing to do with this case. They concern an application for suspension made prior to the deportation hearing. They grant an alien the *benefit* of disclosable material (8 C. F. R. 150. 9). That is far different from the utilization of confidential information against him. The fact is that 8 C. F. R. 150 is a title concerned with procedures at the time of investigation or arrest. 8 C. F. R. 151 (1951 Ed.), the title with which we are here concerned relates to "Deportation Proceedings: Hearing and Adjudication." 8 C. F. R. 151. 5 (1951 Ed.) as did the predecessor section, 8 C. F. R. 150. 7(b) (1949 Ed.) requires that evidence on discretionary relief be taken at the deportation hearing. And evidence relates only to that which is introduced as such. *United States* v. *Abilene & S. R. R. Co.*, 265 U. S. 274, 288 (1924). Obviously, there would be little point to regulations which require evidence on issues if such issues are to be disposed of upon the basis of confidential information.

The issue in a deportation hearing, to be sure, is whether an alien is deportable—but there is also the issue as to whether he should be permitted to stay here. Perhaps the latter phase is a matter of grace and a privilege indeed, but it is inextricably woven into the deportation hearing itself.

There is only one deportation hearing. In recognition of this, the entire hearing has been for years conducted as a single unit upon the record evidence. Since 1940, Congress

has been aware of the fact that suspension of deportation has been granted or denied upon record evidence. The Department of Justice has rendered reports of suspension cases to Congress twice monthly when it has been in session. (See House Document 541, 77th Cong. 2d Sess.) The amendment of the law in 1948 (62 Stat. 1206) without changing the hearing practice indicates Congressional approval of the hearing procedure in suspension cases. *Mogis* v. *Lyman-Richey Sand & Gravel Corp.*, 189 F. 2d 130, 140 (C. A. 8, 1951).

Indeed, the statute here, 8 U. S. C. 155(c)(2) requires the Attorney General to make findings on discretionary relief and findings contemplate record evidence as a basis. Such has been the interpretation of Congress. In summarizing existing law on suspension of deportation, Senate Report 1515, 81st Congress, 2nd Session, states at page 599:

> "On the basis of the *evidence presented*, the presiding inspector prepares a memorandum of his findings, conclusions, and recommendations, a copy of which is furnished the alien or his attorney." (Italics supplied.)

Respectfully submitted,

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